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Argentina's Right to Be Forgotten

Edward L. Carter
Brigham Young University, ed_carter@byu.edu

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INTRODUCTION

The twentieth century Argentine author Jorge Luis Borges wrote a fictional short story about a boy named Ireneo Funes who suffered the curse of remembering everything.[1] For Funes, the present was worthless because it was consumed by his memories of the past. One contemporary author has described the lesson of Funes: "Borges suggests that forgetting—that is, forgetting ceaselessly—is essential and necessary for thought and language and literature, for simply being a human being."[2] The struggle between remembering and forgetting is not unique to Borges or Argentina, but that struggle has manifested itself in Argentina in poignant ways, even outside the writings of Borges. In recent years, the battle has played out in Argentina's courts in the form of lawsuits by celebrities against the Internet search engines Google and Yahoo.

Actresses, models and athletes have brought some two hundred lawsuits, most filed by the lawyer Adolfo Martín Leguizamón Peña, against Google and Yahoo to demand removal of Internet search results and links to photographs.[3] Many of the plaintiffs allege that Internet search results improperly associate their photographs—some of which are sexually suggestive and which were presumably taken and posted originally with permission—with pornography or

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[*] Associate Professor of Communications, Brigham Young University.

[1] JORGES LUIS BORGES, *Funes El Memorioso*, *in* FICCIONES – EL ALEPH – EL INFORME DE BRODIE 50 (Biblioteca Ayacucho 1986).

[2] Aleksandar Hemon, *Alexsander Hemon on Jorge Luis Borges's 'Funes the Memorious,'* DAILY BEAST (Sept. 26, 2012, 4:45 AM), http://www.thedailybeast.com/articles/2012/09/26/aleksandar-hemon-on-jorge-luis-borges-s-funes-the-memorious.html. In his personal life, Borges may have wanted to forget—or have others forget—his "promotion" by the regime of President Juan Domingo Perón from municipal librarian to poultry inspector; long-time bachelorhood, followed by a short-lived and unhappy marriage; criticism for not opposing more publicly and vigorously the "Dirty War" in which Argentina's military dictatorship caused the disappearance of thousands of left-wing opponents; and failing to win the Nobel Prize for Literature even though he was one of the preeminent writers and philosophers of his time. EDWIN WILLIAMSON, BORGES: A LIFE 292–94, 374, 453–54 (2004).

[3] *La Justicia argentina sobreseyó a Adriana Noreña, directora general de Google*, INFO TECHNOLOGY (June 4, 2012, 1:06 PM), http://www.infotechnology.com/internet/La-Justicia-argentina-sobreseyo-a-Adriana-Norea-presidente-de-Google.hmtl-20120604-0005.html.

prostitution.[4] The most prominent of these cases in Argentina involves the Argentine pop singer Virginia Da Cunha, who prevailed against Google and Yahoo in a trial court in 2009 but lost on appeal in 2010.[5] Another plaintiff is the combustible Argentine former soccer star and coach Diego Maradona.[6] Argentina's Supreme Court has yet to weigh in on the issue, although one of the current cases eventually could make its way there.

The current litigation in Argentina has attracted worldwide attention in the form of a growing conflict between privacy and free speech on the Internet. American legal scholar and media commentator Jeffrey Rosen has focused attention on the conflict, decrying the negative effects of the so-called "right to be forgotten."[7] The issue has arisen in the European Union, where a proposed regulation before the European Parliament would recognize a "right to be forgotten and to erasure" for a range of data commonly available online.[8] The EU Data Protection Supervisor already has acknowledged that Article 17 of the proposed regulation, which recognizes the right to be forgotten, may need some revision in order to be viable.[9] Meanwhile, the right to be forgotten has been invoked in litigation in Spain, where the nation's highest court asked the European Court of Justice in 2012 for its opinion on the right of Spaniards to require Google to delete data about them.[10]

Rosen and other free speech advocates have raised concerns that Argentina is leading a growing movement for a broad right to be forgotten that could shut down access to previously public information. A close examination of the Da

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[4] *Id.*

[5] Leo González Pérez, *La pelea entre modelos y buscadores sumó otro round*, CLARÍN (Aug. 23, 2010), http://www.clarin.com/sociedad/pelea-modelos-buscadores-sumo-round_0_322167828.html.

[6] Uki Goni, *Can a Soccer Star Block Google Searches?*, TIME (Nov. 14, 2008), http://www.time.com/time/world/article/0,8599,1859329,00.html.

[7] Jeffrey Rosen, *The Deciders: The Future of Privacy and Free Speech in the Age of Facebook and Google*, 80 FORD. L. REV. 1525, 1534 (2012); Jeffrey Rosen, *Free Speech, Privacy, and the Web That Never Forgets*, 9 J. TELECOMM. & HIGH TECH. L. 345, 352 (2011); Jeffrey Rosen, *The Right to Be Forgotten*, 64 STAN. L. REV. ONLINE 88 (2012); Jeffrey Rosen, *The Web Means the End of Forgetting*, N.Y. TIMES, July 25, 2010, § 6 (Magazine), at 30.

[8] *Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation)*, at 9, COM (2012) 11 final (Jan. 25, 2012).

[9] Peter Hustinx, *Opinion of the European Data Protection Supervisor on the Data Protection Reform Package*, EUROPEAN DATA PROTECTION SUPERVISOR 1, 19 (Mar. 7, 2012), http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2012/12-03-07_EDPS_Reform_package_EN.pdf.

[10] T.C. Sottek, *Spain Challenges Google with 'Right to be Forgotten' in EU*, VERGE (Mar. 5, 2012, 11:45 AM), http://www.theverge.com/2012/3/5/2846192/google-right-to-be-forgotten-Spain-EU-court.

Cunha case, however, suggests that free-expression fears about the right to be forgotten might be premature. The short-lived right-to-be-forgotten victory of Da Cunha, as with other plaintiffs who have prevailed in Argentina's courts, actually hinged on decades-old notions of privacy, intellectual property, and data protection. Still, the combination of those claims in the context of Internet speech promises a continued fight over the proper balance between freedom of speech and privacy. Argentine plaintiffs, and some judges, appear ready to strike a blow to the Internet's penchant for memorializing things forever. This Recent Development tracks the current trend of litigation on the issue in Argentina.

I. DA CUNHA V. YAHOO AND GOOGLE (LOWER COURT HOLDS AGAINST SEARCH ENGINES)

Virginia Da Cunha is a thirty-one-year-old dancer, singer, actress and model from Córdoba, Argentina.[11] As part of a group called Bandana, Da Cunha came to prominence through the television reality competition "Popstars" in 2001.[12] Bandana arrived at No. 1 in Argentina and Da Cunha began appearing on television as an actress and personality.[13] She participated in the 2009 Vans Warped Tour in the United States as part of a band called Virgin Pancakes[14] that later evolved into a collaboration with her brother, Fernando, under the name V.[15] She also has done television work for Fox Sports in Argentina.[16] Her official website shows her in low-slung tight pants and a tube top, and she currently posts on Twitter under the name @VirginDaCunha.[17] On Twitter and Facebook Da Cunha posts various pictures of herself, including in short shorts, swimsuits, tank tops and at least one sexually provocative pose.[18]

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[11] *Virginia Da Cunha*, IMDB, http://www.imdb.com/name/nm1135788/ (last visited May 1, 2013); *Virginia Da Cunha*, FACEBOOK, https://www.facebook.com/virginia.dacunha/about (last visited May 1, 2013).

[12] *Popstars: Argentina*, IMDB, http://www.imdb.com/title/tt0309201/fullcredits (last visited May 1, 2013).

[13] Leonardo Ibáñez, *Bandana me hizo tirar por la borda various prejuicios*, GENTE, http://www.gente.com.ar/nota.php?ID=6907 (last visited May 1, 2013).

[14] *Virgin Pancakes on Their Way to the U.S. Warped Tour*, EMBASSY OF THE UNITED STATES: BUENOS AIRES, ARGENTINA (Feb. 11, 2009), http://argentina.usembassy.gov/vp_event.html.

[15] V, http://www.vlive.com.ar/landing/ (last visited May 1, 2013).

[16] *Invierno Fox Sports 2011, Virginia Da Cunha*, YOUTUBE.COM (Apr. 13, 2012), http://www.youtube.com/watch?v=MbatKi3sSRg.

[17] *See* V, *supra* note 15; *Virginia Da Cunha*, TWITTER, https://twitter.com/VirginDaCunha (last visited May 1, 2013).

[18] *See, e.g.*, *V Oficial's Photos*, FACEBOOK (Dec. 7, 2011), https://www.facebook.com/photo.php?fbid=171227212974845&set=pb.164252130339020.-2207520000.1351206959&type=3&theater.

In her lawsuit against Google and Yahoo, Da Cunha alleged that family members and friends told her that her name and photographs appeared in Google and Yahoo search engine results linked to, or used in, websites offering sexual content, pornography, escorts, and other activities related to sex trafficking.[19] Da Cunha claimed this was done without her permission and was harming her career as a model, singer, actress and television personality.[20] Da Cunha sought damages of 200,000 Argentine pesos (about $42,000) for material and moral harms, specifically damage to her rights of personality, reputation, and privacy.[21] She also made a copyright-like claim that Google and Yahoo enabled users, without her permission, to download photos of Da Cunha and have them printed, enlarged, and modified into books.[22] Furthermore, she asserted that the search engine results linking her to sex-related websites did not conform with her personal beliefs or professional activities.[23]

Google and Yahoo both responded that Da Cunha had not alleged any wrongdoing on their part and that, even if she had been harmed, there was no causal link between that harm and their own activities.[24] Buenos Aires-based Judge Virginia Simari issued an opinion in favor of Da Cunha on July 29, 2009. Simari first observed that Google and Yahoo could filter from search results all references to pornography, erotica or sex in metatags.[25] She then pointed out that Yahoo had a filter specifically to include adult-only websites, indicating that Yahoo could also exclude those same sites from its search results.[26] Neither of the search engines, she said, indexed all of the pages of the Internet; some pages were blocked for government-mandated legal reasons and others were blocked under contract or at the request of users.[27]

Simari viewed the key conflict in the case as between the right to freedom of expression, on the one hand, and the right of an individual to control the use

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19 Juzgado de Primera Instancia [1A INST.] [Court of First Instance], 29/7/2009, "Da Cunha, Virginia c. Yahoo de Argentina s/ Daños y Perjuicos," (Resulta, I, para. 3) (Arg.) *available at* http://www.diariojudicial.com/documentos/adjuntos/DJArchadjunto17173.pdf [hereinafter Opinion of Judge Simari].

20 *Id.* (Resulta, I, para. 6).

21 *Id.* (Resulta, I., para. 1); *Revés judicial para un ex Bandana que demand a Google y Yahoo*, LOS ANDES (Aug. 13, 2010), http://www.losandes.com.ar/notas/2010/8/13/reves-judicial-para-bandana-demando-google-yahoo-508241.asp.

22 Opinion of Judge Simari, (Resulta, I, para. 5).

23 *Id.*

24 *Id.* (Resulta, III, para. 3); *Id.* (Resulta, IV, paras. 2–4).

25 *Id.* (Y Considerando, I, paras. 29, 32).

26 *Id.* (Y Considerando, I, para. 51).

27 *Id.* (Y Considerando, I, para. 55).

of his or her image, on the other hand.[28] With respect to freedom of speech, the judge pointed to Article 14 of the Argentine Constitution, which guarantees that "[a]ll the inhabitants of the Nation are entitled to . . . publish their ideas through the press without previous censorship."[29] She also referenced Article 32, which says that "[t]he Federal Congress shall not enact laws restricting the freedom of the press or establishing federal jurisdiction over it."[30] In juxtaposition, the judge said, was the right of an individual to control the use of his or her image.[31] While the judge acknowledged that this was not a right explicitly protected in the Constitution of Argentina, she pointed out that this right is mentioned in the American Declaration of the Rights and Duties of Man,[32] the Universal Declaration of Human Rights,[33] the American Convention on Human Rights (also known as the Pact of San José de Costa Rica),[34] and the International Covenant on Civil and Political Rights.[35] In reality, none of these instruments mentions specifically a right to control the use of one's image but instead they all refer to general rights of reputation and privacy.[36]

Simari then stated that the right to control one's image is among the rights of personhood and includes the prerogative to prevent others from capturing,

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[28] *Id.* (Y Considerando, II.a., para. 1).

[29] *Id.* (Y Considerando, II.a., para. 2); Art. 14, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.), *translation available at* http://www.senado.gov.ar/web/interes/constitucion/english.php.

[30] *Id.* (Y Considerando, II.a., para. 2); Art. 32, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.), *translation available at* http://www.senado.gov.ar/web/interes/constitucion/english.php.

[31] *Id.* (Y Considerando, II.a., para. 3).

[32] *Id.* (citing American Declaration of the Rights and Duties of Man art. 5, OAS Res. XXX, OAS Doc. OEA/Serv.L.V./II.23 (May 2, 1948)).

[33] *Id.* (citing Universal Declaration of Human Rights art. 12, G.A. Res. 217A (III), U.N. Doc. A/810 (1948)).

[34] *Id.* (citing American Convention on Human Rights art. 11 para. 2, *opened for signature* Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978)).

[35] *Id.* (citing International Covenant on Civil and Political Rights art. 17, *opened for signature* Dec. 19 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976)).

[36] *Cf.* American Declaration of the Rights and Duties of Man, *supra* note 32, art. 5 ("Every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life."); Universal Declaration of Human Rights, *supra* note 33, art. 12 ("No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."); International Covenant on Civil and Political Rights, *supra* note 35, art. 17 ("No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."); American Convention on Human Rights, *supra* note 34, art. 11, para. 2 ("No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.").

reproducing, broadcasting, or publishing one's image without permission.[37] Simari referenced a treatise written by the Buenos Aires lawyer, author, and law professor Julio César Rivera, suggesting the right to control one's personal data includes the right to prevent others from using one's image.[38] In the treatise, Rivera discussed proposed revisions to the Argentine Civil Code that were never adopted, which would have specified that individuals or entities collecting and processing personal data about others must respect the right of data subjects to correct the information for comprehensiveness and meaning; to update the information or delete outdated information; and to ensure the information is used in conformity with the purposes for which it was collected.[39]

Simari then specified that in each case, the image that the law should protect is the image that conforms with the image created by its subject, and stated that this image might change over time.[40] Further, the judge said, the fact that an individual's profession requires public display of his or her image does not authorize third parties to make unlimited use of that image.[41]

Simari concluded that the appearance of Da Cunha's photographs on the search engines of Google and Yahoo, linked with pornography, sex trafficking and prostitution, constituted a violation of Da Cunha's right to control her own image in the present time, when she opposed the message that the linked photographs would send.[42] The judge concluded that no material damage had occurred but ordered Google and Yahoo to each pay 50,000 pesos for moral damages and to remove Da Cunha's photographs from search results related to sex, eroticism, and pornography.[43]

II. DA CUNHA V. YAHOO AND GOOGLE (APPEALS COURT HOLDS IN FAVOR OF SEARCH ENGINES)

On appeal, however, a three-judge federal civil appellate court reversed Judge Simari's decision and held instead that Google and Yahoo were not responsible for any harms caused to Da Cunha by Internet users posting her

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37 Opinion of Judge Simari, (Y Considerando, II.a., para. 6).
38 *Id.* (citing JULIO CÉSAR RIVERA, 2 INSTITUTICIONES DEL DERECHO CIVIL 114 (3d ed. 2004)).
39 RIVERA, *supra* note 38, at 113.
40 Opinion of Judge Simari, (Y Considerando, II.a., para. 10).
41 *Id.* (Y Considerando, II.a, para. 11).
42 *Id.* (Y Considerando, II.a, paras. 27–29).
43 *Id.* (Y Considerando, II.a, para. 30, IV, para.2).

photos on sex-related websites.[44] Judge Patricia Barbieri observed that search engines could not be held responsible for the content individuals and entities decided to publish on their own websites.[45] The fact that search engines cataloged those sites and provided links was not sufficient to establish causation with respect to injury, the judge said.[46] Barbieri expressed sympathy with the subjects of news articles and Internet commentaries, given the free and unregulated nature of the Internet.[47] But she cited Section 230 of the U.S. Communications Decency Act[48] and a similar provision in the EU's 2000 Electronic Commerce Directive[49] in reiterating that search engines could not be held responsible. Finally Barbieri invoked Google's own Terms of Service, stating that Google was not responsible for content on individual websites, and Google's compliance with the notice and take-down provisions of the U.S. Digital Millennium Copyright Act.[50]

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[44] *See* Cámara Nacional de Apelaciones en lo Civil de la Capital Federal [CNCiv.] [National Court of Civil Appeals of the Federal Capital], sala D, 10/8/2010, "Da Cunha Virginia c/ Yahoo de Argentina SRL y otro s/ Daños y Perjuicios," (Arg.) [hereinafter Da Cunha Appellate Court Judgment].

[45] Barbieri specifically referenced Article 1071 *bis* of the Argentine Civil Code and Article 31 of the Argentine Intellectual Property Law (Ley 11.723). *See id.* (La solución, § VI.4, para. 6) (Barbieri, J.). Article 1071 *bis* prohibits arbitrarily interfering in another's life, publishing portraits, broadcasting correspondence, tormenting others in their habits or feelings, or disturbing their privacy in any way. CÓDIGO CIVIL [CÓD. CIV.] [CIVIL CODE] art. 1.071 *bis* (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/105000-109999/109481/texactley340_libroII_S2_tituloVIII.htm (last visited May 8, 2013). Article 31 of the Argentine Intellectual Property Law (Ley 11.723) states that a photographic portrait of a person cannot be placed in commerce without the express content of the subject or, if deceased, his or her spouse, children or direct descendants, or if those are not present, his or her father or mother. Law No. 11723 art. 31, Sept. 30, 1933, B.O. (Arg.) (last amended Oct. 14, 1998), *available at* http://www.wipo.int/wipolex/es/text.jsp?file_id=124712 [hereinafter Argentine Intellectual Property Law]. If the spouse, children, father or mother, or descendants, are not present, publication is allowed. *Id.* Any person who has given his or her consent may revoke it and claim damages. *Id.* Publication of a portrait is allowed when it relates to ends that are scientific, instructional and cultural, or related to activities and circumstances of public interest or that have taken place in public. *Id.*

[46] Da Cunha Appellate Court Judgment, (La solución, § VI.4, para. 58) (Barbieri, J.).

[47] *Id.* (La solución, § VI.4, para. 41) (Barbieri, J.).

[48] *Id.* (La solución, § VI.4, para. 50) (citing 47 U.S.C. § 230(c)(1) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.")).

[49] *Cf. Id.* (La solución, § VI.4, para. 51) (citing Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), art. 12, 2000 O.J. (L 178) 1, 12 (EC) ("Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted. . . .")).

[50] *Id.* (La solución, § VI.4, para. 60) (Barbieri, J.).

Judge Ana María R. Brilla de Serrat joined Barbieri in voting to reverse the lower court's decision, but her reasoning was unclear.[51] Apparently Brilla de Serrat agreed that, in the search engine context, Google and Yahoo could not be held liable.[52] However, she spent most of her brief opinion defending the idea that individuals should have a right to be forgotten. Brilla de Serrat cited Italian legal commentator Stefano Rodotà for the proposition that the right to be left alone includes a right to control information about oneself.[53] In the only mention in the entire Da Cunha case of the "right to be forgotten," Brilla de Serrat cited the Italian legal principle that convicted criminals who have served their sentences should not be forever linked with publication of information about their crimes.[54] Italian law prohibits continued publication of news or information about those crimes unless new events lead to legitimate and current public interest in publication.[55]

Brilla de Serrat then cited the scholar Viktor Mayer-Schönberger as stating that digital information almost never disappears, even if we want it to, and that this results in the permanence of the past in the present.[56] Again referring to Mayer-Schönberger, the judge stated that for thousands of years, forgetting formed part of the human condition, but that in the digital age, the opposite occurs because of inexpensive computer storage, powerful processors, and widespread access to the Internet. Brillat de Serrat went on to state that remembering has become the norm, and that she agreed with Mayer-Schönberg's statement that it is worth remembering that with respect to some things, there is value in forgetting.[57]

The third judge, Diego C. Sanchez, disagreed with his two colleagues. Judge Sanchez would have affirmed the lower court opinion in favor of Da Cunha.[58] Sanchez quoted the famous line from William Blackstone, who said in his eighteenth century *Commentaries* that freedom of the press consists in laying no previous restraints upon publications, not in freedom from censure for criminal matter when published.[59] Sanchez argued that search engines are not merely passive carriers of information, but active participants in drawing

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51 *Id.* (La Dra. Ana María R. Brilla de Serrat dijo) (Brilla de Serrat, J.).
52 *Id.*
53 *Id.* (La Dra. Ana María R. Brilla de Serrat dijo, para. 5).
54 *Id.* (La Dra. Ana María R. Brilla de Serrat dijo, para. 7).
55 *Id.*
56 *Id.* (La Dra. Ana María R. Brilla de Serrat dijo, para. 8).
57 *Id.* (La Dra. Ana María R. Brilla de Serrat dijo, para. 9).
58 *Id.* (Se concluye textualmente en le primer voto, § V.1, para. 4) (Sanchez, J.).
59 *Id.* (Derecho, § III, para. 3).

attention to certain pieces of data while disregarding others.[60] In that process, he said, search engines are capable of causing harm to people whose personal information is found within search results.[61]

The result of the appellate court opinion, then, vacated the lower court's order prohibiting Google and Yahoo from linking Da Cunha's photographs with sexually oriented websites. As of May 2013, however, Yahoo Argentina (yahoo.com.ar) has still blocked all searches related to Da Cunha, although Google Argentina (google.com.ar) has not.[62] Both sites' U.S. search engines do return results for Da Cunha.[63]

III. ARGENTINE LAW AND FORGETTING

In recent years, the potential damage from the Internet's perpetuation of the past has started catching attention of scholars and policymakers around the world. The American legal scholar Daniel J. Solove, for example, wrote in a book published in 2007:

> We're heading toward a world where an extensive trail of information fragments about us will be forever preserved on the Internet, displayed instantly in a Google search. We will be forced to live with a detailed record beginning with childhood that will stay with us for life wherever we go, searchable and accessible from anywhere in the world. This data can often be of dubious reliability; it can be false and defamatory; or it can be true but deeply humiliating or discrediting. . . . Ironically, the unconstrained flow of information on the Internet might impede our freedom.[64]

One contemporary scholar proposed that digital information be embedded with an expiration date so that it can pass from non-human memory just like it would pass from human memory.[65] In Argentina, the virtues of forgetting are

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[60] *Id.* (Derecho, § III.2, para. 2).

[61] *Id.*

[62] In response to a search for "Virginia Da Cunha," Yahoo Argentina presents a message in Spanish that translates to, "Because of a court order requested by private parties, we are obligated to suppress temporarily all or some of the results related to this search." YAHOO.COM.AR, http://ar.search.yahoo.com/search?p=%22virginia%20da%20cunha%22 (last visited May 3, 2013) (translation by author). *But see* GOOGLE.COM.AR, http://www.google.com.ar/#q=Virginia+da+cunha (last visited May 3, 2013).

[63] YAHOO.COM, http://search.yahoo.com/search?p=Virginia+da+cunha (last visited May 3, 2013); GOOGLE.COM, https://www.google.com/#q=Viriginia+da+cunha (last visited May 3, 2013).

[64] DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET 17 (2007).

[65] VIKTOR MAYER-SCHÖNBERGER, DELETE: THE VIRTUE OF FORGETTING IN THE DIGITAL AGE 183 (2011).

not only now being recognized. Argentine law began decades ago to recognize the dangers of eternal memory.[66]

In language first adopted in the mid-nineteenth century, the Argentine Constitution in Article 18 mandates that "[t]he domicile may not be violated, as well as the written correspondence and private papers."[67] This has been cited as the beginning of privacy law in Argentina.[68] Argentina has a long-standing law, Article 1071 *bis* of the Argentine Civil Code, which prohibits publishing of private photographs of another person and which was cited by Judge Patricia Barbieri in her opinion in the Da Cunha case.[69] In 1956, the Argentine Supreme Court held that a person's past activities as a prostitute could not be taken into consideration to evaluate good character for citizenship purposes because the person was not engaged in prostitution at the time of application.[70] In 1984, the same court held in *Ponzetti de Balbín* that the right to privacy included a right of personality that prevented certain unauthorized uses of one's image,[71] although the court also suggested that public figures who seek attention may not be able to complain about publicity generated within the sphere in which they sought it.[72]

Along with other Latin American countries, Argentina in the 1990s joined the so-called *habeas data* movement by adopting a constitutional provision that is part freedom-of-government-information law and part data privacy law. The Argentine version is called *amparo* and is spelled out in Article 43 of the Argentine Constitution:

> Any person shall file this action to obtain information on the data about himself and their purpose, registered in public records or data bases, or in private ones intended to supply information; and in case

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66 One academic source traces the origins of the right to be forgotten in Argentina, a staunchly Catholic country, to the New Testament injunction by Jesus Christ to forgive one's brother not just seven times but always. *See* FERNANDEZ DELPECH ET AL., PROTECCIÓN DE DATA PESONALES—DERECHO AL OLVIDO 8–10 (2008), *available at* http://www.hfernandezdelpech.com.ar/Trabajo%20Derecho%20al%20Olvido.pdf (citing *Matthew* 18:21–35).

67 Art. 18, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.), *available at* http://www.senado.gov.ar/web/interes/constitucion/english.php (providing an English translation).

68 Eduardo Oteiza, *Información Privada y* Habeas Data, 1999 REVISTA JURÍDICA DE LA UNIVERSIDAD DE PALERMO 167, 168, *available at* http://www.palermo.edu/derecho/publicaciones/pdfs/revista_juridica/Especiales_SELA/SELA%201998%20-%20Ed%201999/04SELA98Juridica13.pdf.

69 *See supra* note 45 and accompanying text.

70 Oteiza, *supra* note 68, at 168–69.

71 *Id*. at 169.

72 *Personality Rights in Argentina – An Introduction*, SCRIPT, http://www.law.ed.ac.uk/ahrc/personality/argentina.asp (last visited May 3, 2013).

> of false data or discrimination, this action may be filed to request the suppression, rectification, confidentiality or updating of said data.[73]

Compared with other Latin American countries' *habeas data* laws, the Argentine version has been called "the most complete" because of its guarantee of an individual right to correct, suppress, or update government-held information about oneself, or to have the information declared confidential.[74] The Argentine *amparo* contains an exception for news reporting by journalists.[75]

In October 2000, the Argentine Congress adopted a comprehensive data protection law, known as Ley 25.326, that regulates how public and private databases collect, process, and distribute data about individuals.[76] Among other things, in Article 4, the law guarantees that data should be accurate, complete, relevant, and not excessive in relation to the purpose for which it is obtained.[77] The same section also requires that data be destroyed when it ceases to be necessary or relevant for the purposes for which they were collected.[78] In order to implement the law, the Argentine Ministry of Justice and Human Rights adopted a regulation, known as Decreto 1558/2001, that requires databases to eliminate data that is no longer useful for the purposes for which they were collected, even without a demand to do so from the subject of the data.[79]

The Argentine Intellectual Property Law protects the right of an individual to prevent his or her image from being placed in commerce without consent.[80] Although couched as a matter of intellectual property, this right could be compared to the rights in other countries to sue for misappropriation of one's

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[73] Art. 43, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.), *available at* http://www.senado.gov.ar/web/interes/constitucion/english.php (providing an English translation).

[74] Andres Guadamuz, *Habeas Data: The Latin-American Response to Data Protection*, 2000 J. INFO. L. & TECH.§ 3.2.4.

[75] *See* Art. 43, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.), *available at* http://www.senado.gov.ar/web/interes/constitucion/english.php (providing an English translation).

[76] Law No. 25326, Nov. 2, 2000, B.O. (Arg.), *available at* http://www1.hcdn.gov.ar/dependencias/dip/textos%20actualizados/25326.010408.pdf [hereinafter Ley 25.326].

[77] *Id.*art. 4.

[78] *Id.*

[79] Decree 1558/2001, Dec. 12, 2001, B.O. (Arg.), *available at* http://www1.hcdn.gov.ar/dependencias/dip/textos%20actualizados/25326.010408.pdf [hereinafter Decreto 1558/2001]. Under Ley 25.326 and Decreto 1558/2001, debtors are entitled to have the fact of their past debts forgotten after a certain period of years. *Id.* art. 26; Ley 25.326, *supra* note 76, art. 26; *accord* DELPECH ET AL., *supra* note 66, at 11–13. For debts that are paid off, the forgetting must happen within two years, while even debts that are not paid are entitled to be forgotten five years after the last attempt by the creditor to collect the debt. Ley 25.326, *supra* note 76, art. 26; Decreto 1558/2001, *supra*, art. 26; *see also* DELPECH ET AL., *supra* note 66, at 11–13.

[80] Argentine Intellectual Property Law, *supra* note 45.

name or likeness. The Argentine version allows unauthorized use of another person's image only for scientific, educational, or other purposes in the public interest.[81] One commentator noted that this Argentine right against unauthorized use of an image is deep-seated: "[T]he violation of the right to image is seen as an attack of the dignity of the person as it amounts to an instrumentalisation of it, reducing it as an object . . . ."[82] The Argentine Supreme Court has signaled that the right to control use of one's photographic image is separate and distinct from claims that could be made for harm to honor or privacy.[83]

Argentina's unique intellectual property, data protection, and privacy laws have all become relevant in some celebrities' fight against the Internet's eternal memory. In addition to the Da Cunha case, there are approximately two hundred similar cases pending in Argentina's courts.[84] Although many of those remain in various stages of litigation, including appeals, several—but not all—have resulted in victories for the plaintiffs. These courts have not explicitly adopted the "right to be forgotten" language of Judge Brilla de Serrat, however, and instead have based decisions on copyright, privacy, and data protection.

For example, in 2010, the same year that Google and Yahoo prevailed over Da Cunha on appeal, the Argentine dancer, television personality, and lingerie model Belén Rodriguez obtained a combined judgment against Google and Yahoo of 120,000 pesos for unauthorized use of her name and image connected to pornographic or sexually oriented sites in their search results.[85] In March 2012, the Argentine celebrity model Evangelina Carrozo also obtained a judgment against Google and Yahoo for unauthorized use of her image.[86] Carrozo's claim was based on the Argentina Intellectual Property Law, Ley 11.723, and alleged that Google and Yahoo used her image in an unauthorized

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[81] *Id.*

[82] *Personality Rights in Argentina – An Introduction*, *supra* note 72 (citation omitted).

[83] *Id.*

[84] Fernando Tomeo, *Modelos vs buscadores: Yahoo gana la batalla*, INFORMÁTICA LEGAL (Dec. 5, 2011, 3:42 PM), http://www.informaticalegal.com.ar/2011/12/05/modelos-vs-buscadores-yahoo-gana-la-batalla/.

[85] *Id.*; *Belén Rodriguez le ganó $120 mil a Google y Yahoo!*, CONURBANO ONLINE, http://24con.infonews.com/conurbano/nota/37474-belen-rodriguez-le-gano-120-mil-a-google-y-yahoo/ (last visited May 5, 2013).

[86] Juzgado Nacional de Primera Instancia [1A INST.] [Court of First Instance], 22/3/2012, "Carrozo Evangelina c. Yahoo de Argentina S.R.L. s/ Interrupción de la Prescripción," (Resulta, I, para. 1) (Arg.), *available at* http://www.hfernandezdelpech.com.ar/Sentencia%20Carrozo%20c.%20Yahoo%20y%20Google.pdf.

commercial way on their search engines by linking her photographs with sexually oriented websites that were against her beliefs and personal conduct.[87]

Meanwhile, federal appellate courts in August and September 2012 revived two separate lawsuits by Argentine celebrities against Internet search engines after the claims had previously been rejected by trial courts. An Argentine federal court held in 2011 that Google and Yahoo could not be held responsible to singer and dancer Andrea Paola Krum for placing her photograph in commerce, a requirement of Ley 11.723 in order to prevail on a claim of unauthorized commercial use of an individual's image.[88] However, on August 31, 2012, a three-judge appellate panel reversed the decision and held that Krum's right to control use of her image had been violated.[89] The appeals court ordered Google to pay Krum 75,000 pesos and Yahoo to pay Krum 15,000 pesos, and to stop using her image linked to sexually explicit websites.[90] Similarly, an appeals court in September 2012 reversed an earlier decision against model Priscila Prete and held that Yahoo used Prete's image in violation of law.[91] Trial judges in 2012 also ordered Google to stop using photos of and pay damages to the Argentine model Bárbara Lorenzo and the deceased Argentine model Jazmín De Grazia.[92]

IV. IMPLICATIONS OF ARGENTINA'S JURISPRUDENCE

Although many cases remain to be decided, Argentina's courts appear willing at this point to grant celebrity plaintiffs an effective right to control use of their images online even if not broadly instituting a new right to be forgotten. Instead of adopting the Italian legal concept of the right to be forgotten for reformed criminals, Argentine judges (other than Judge Brilla de Serrat in the Da Cunha case) have rested decisions in favor of celebrities on claims of copyright, privacy and data protection. Even Judge Brilla de Serrat

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87 *Id.*

88 Juzgado Nacional de Primera Instancia [1A INST.] [Court of First Instance], 24/6/2011, "Krum, Andrea Paola c. Yahoo de Argentina S.R.L. y otro s/ daños y perjuicios," (Considerando, para. 98) (Arg.) (on file with author).

89 Cámara Nacional de Apelaciones en lo Civil de la Capital Federal sala J [CNCiv.] [National Court of Civil Appeals of the Federal Capital section J], 31/8/2012, "Krum, Andrea Paolo c. Yahoo de Argentina S.R.L. y otro s/daños y perjuicios," (132–33) (Arg.), *available at* http://consultas.pjn.gov.ar/consultas/civil/mostrarpdf.php?causa=84103&ano=2007&pass=&desp=31066010j.pdf&juzgado=62.

90 *Id.* at 133–34.

91 Tomeo, *supra* note 84.

92 *Una modelo argentina ganó un juicio a Google por fotos de ella en sitios porno*, TELESHOW, http://teleshow.infobae.com/notas/669333-Una-modelo-argentina-gano-un-juicio-a-Google-por-fotos-de-ella-en-sitios-porno.html (last visited May 5, 2013).

voted against Da Cunha's claim, thereby making her discussion of the right to be forgotten *dicta* at best.[93] It is ironic that while the Da Cunha case has become well-known globally, it is one of the few cases so far in which Argentine celebrity clients of Leguizamón have not prevailed against Internet search engines.

It has been noted that Argentina's right to control use of one's image in Ley 11.723 has a strict requirement for the proponent of using another's image to demonstrate that he or she has obtained consent: "Consent is essential and interpreted narrowly. It cannot be deducted by conduct or given implicitly. It must be expressed and repeated for each publication or utilisation."[94] Although Google and Yahoo have tried to argue in several cases that the Argentine models and actresses opened the door to use of their images in connection with sexually oriented websites by posing for provocative photos, courts have not gone along with this argument, presumably because the strict requirements for consent to use the women's images were not met.[95] Even if models consented in the past to the taking of their photographs in scant clothing or suggestive poses for commercial uses, Argentina's courts have suggested this does not constitute present consent for use of their images on search engine results linked to websites involving pornography, prostitution or other forms of sexual conduct.[96]

The strict requirements for consent in Argentina may mirror the science of human forgetting more closely than does the eternal nature of digital memory. Multiple scholars beginning with Ebbinghaus have discovered that the human forgetting curve is steep.[97] Forgetting is an essential part of human memory and begins almost immediately upon learning.[98] The brain continually overwrites its own memories, and without forgetting, memory would be impossible.[99] The human brain seems to have developed the ability to recognize, based on past patterns, which memories will not likely be needed in the future and to place a low priority on those memories for purposes of

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93 *See supra* notes 51–55 and accompanying text.

94 *Personality Rights in Argentina – An Introduction*, *supra* note 72.

95 *See supra* notes 85–90 and accompanying text.

96 *Id.*

97 *See, e.g.*, HERMANN EBBINGHAUS, MEMORY: A CONTRIBUTION TO EXPERIMENTAL PSYCHOLOGY *passim* (Henry A. Ruger trans., 1913) (1885).

98 WILLIAM JAMES, TEXT-BOOK OF PSYCHOLOGY 300–01 (1892).

99 John T. Wixted, *The Psychology and Neuroscience of Forgetting*, 55 ANN. REV. PSYCH. 235, 264 (2004); *see also* Jacob A. Berry et al., *Dopamine Is Required for Learning and Forgetting in* Drosophila, 74 NEURON 530 (2012).

consolidation.[100] Although research in the area of beneficial organizational forgetting needs more development, some research indicates that organizations, like humans, must forget in order to be successful.[101] Societies, then, like individuals, may benefit from recognizing that eternal and detailed memories of relatively unimportant information could hinder rather than aid their progress.

Rosen has cited a blog post by Google's chief privacy counsel, Peter Fleischer, which raises three scenarios of increasing threat to freedom of speech.[102] First is the question of whether someone has the right to delete something he has posted online.[103] Rosen believes legal requirements allowing Internet users to do this would be superfluous since Facebook and other social media sites already provide for it in their terms of service.[104] More controversial, Rosen says, is the second situation in which someone else has copied a photo posted online by a user and then the user wants to demand the copying party to take it down.[105] Rosen posits that the proposed European Union right to be forgotten would require a website to take the photo down from the account of anyone who has copied and posted it.[106] Finally, Rosen cites a third category in which individuals can demand takedown of items and information about them posted by others.[107] It is here where Rosen believes freedom of speech is most severely infringed by a right to be forgotten that would mandate such requests be met.[108]

While the concerns of Rosen and Fleischer about freedom of speech are valid, so too are the real desires of other individuals to change their online identities in conjunction with changes in their real-world lives. Ultimately, freedom of speech and the right to be forgotten must be balanced. The cases from Argentina discussed here also recognize the need to consider free-speech

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100 Lael J. Schooler & Ralph Hertwig, *How Forgetting Aids Heuristic Inference*, 112 PSYCH. REV. 610, 624 (2005).

101 *See, e.g.*, Pablo Martin de Holan & Nelson Phillips, *Remembrance of Things Past? The Dynamics of Organizational Forgetting*, 50 MGMT. SCI. 1603 (2004).

102 Rosen, *The Right to be Forgotten*, *supra* note 7, at 91 (citing Peter Fleischer, *Foggy Thinking About the Right to Oblivion*, PETER FLEISCHER: PRIVACY. . .? (Mar. 9, 2011, 8:59 AM), http://peterfleischer.blogspot.com/2011/03/foggy-thinking-about-right-to-oblivion.html).

103 Rosen, *The Right to be Forgotten*, *supra* note 7, at 90.

104 *Id.*

105 *Id.*

106 Rosen acknowledges that the proposed European right has exceptions if the photo is necessary for freedom of expression or used for a journalistic purpose. *Id.*

107 *Id.* at 91.

108 *Id.* at 91–92.

concerns, although in almost all the cases, the intellectual-property statute has been given priority over free speech.[109] That an intellectual property statute would win out over notions of free speech, however, is not particularly controversial or uncommon in other countries. For example, it happened prominently in the United States in 2012 when the Supreme Court rejected a claim of First Amendment violation after Congress brought certain public domain works back into copyright protection.[110]

Fears that Argentina is leading a charge toward a broad new right to be forgotten are unfounded. Argentine court judgments favorable to plaintiffs suing Internet search engines have rested on statutory rights of intellectual property, reputation, data protection or privacy. Most of these had to do with the unique Argentine Ley 11.723 for placing a photograph into commerce without authorization. In only one case—the appellate court opinion in Da Cunha—was the right to be forgotten even explicitly discussed. Even then, its most poignant explication came at the hands of a judge who rejected it in favor of the arguments for free speech advanced by the Internet search engines Google and Yahoo. But many of Argentina's cases remain to be decided, and courts there could yet explicitly adopt the right to be forgotten. If so, that could still be a salutary development as long as free-speech interests are not disregarded altogether.

CONCLUSION

Borges' story of Ireneo Funes illustrated the perils of eternal and complete memory. Some commentators also have credited Borges, in another short story published in 1941, with presaging the Internet.[111] Borges envisioned "an infinite series of times, in a growing, dizzying net of divergent, convergent and parallel times."[112] The multiple simultaneous realities of the Internet are all preserved virtually in perpetuity. A person's online identity at one point in time can become permanently crystallized, and that virtual identity may not change even though the person has changed. Since the Internet does not know, or does not remember, how to forget, it may be that society may have to force it to re-learn that most basic of human functions. In a world with multiple realities,

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109 *See supra* notes 85–90 and accompanying text.

110 Golan v. Holder, 132 S. Ct. 873 (2012).

111 Perla Sassón-Henry, *Chaos Theory, Hypertext, and Reading Borges and Moulthrop*, 8 CLCWEB, no. 1, 2006, at 1, *available at* http://docs.lib.purdue.edu/clcweb/vol8/iss1/1.

112 JORGES LUIS BORGES, *El Jardín de Senderos Que Se Bifurcan*, *in* FICCIONES – EL ALEPH – EL INFORME DE BRODIE 42 (Biblioteca Ayacucho 1986).

society must decide whether each individual gets to define her current identity or whether others may be allowed to impose upon her an identity that may once have been accurate but that remains so no longer.